

# Exhibit 6

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DEPUTY

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8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
9 **IN AND FOR THE COUNTY OF PINAL**

No. CVC 2004-01368

10 The Parsons Company Inc.,  
11 Plaintiff,

12 v.

13 AWD Ranch LLC, et al.,

14 Defendants,

15 (And Related Cross and Counter-Claims)

DEFENDANT AWD FARMS, LLC'S  
FIRST MOTION FOR SUMMARY  
JUDGMENT RE: COUNT VII

*(Wrongful Diversion and Unlawful  
Appropriation of Water)*

(Assigned to the Honorable Robert  
Carter Olson)

16 In its Second Amended Complaint, Plaintiff The Parsons Company Inc.  
17 ("Parsons") asserted a claim against Defendant AWD Farms, LLC ("Farms") for  
18 wrongful diversion and unlawful appropriation of water.

19 Based upon the following Memorandum of Points and Authorities, Separate  
20 Statement of Facts (incorporated herein by this reference), the Affidavit of T. Allen J.  
21 Gookin, P.E., L.S., P.H., the opinions of Land Consultant Michael Anable (disclosed  
22 by Plaintiff The Parsons Company, Inc. in its 9<sup>th</sup> Supplemental Disclosure Statement),  
23 and the Court's file herein, Defendant Farms is entitled to summary judgment because  
24 the pleadings and supporting documents, viewed in the light most favorable to  
25 Parsons, "show that there is no genuine issue as to any material fact and that Farms is  
26 entitled to a judgment as a matter of law", as contemplated in Celotex Corp. v.  
27 Catrett, 477 U.S. 317, 322-323 (1986). Defendant Farms therefore respectfully  
28


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1 requests this Court grant summary judgment that it did not wrongfully divert or  
2 unlawfully appropriate water.

3 RESPECTFULLY SUBMITTED this 15 day of June, 2009.

4  
5 DUSTIN T. DUDLEY, ESQ.

6  
7 By: 

8 Dustin T. Dudley, Esq.  
9 One East Camelback, Suite 550  
10 Phoenix, AZ 85012

11 *Attorney for Defendant AWD Farms, LLC*

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **FACTUAL BACKGROUND**

14 On or about September 25, 2002, Walkers sold certain land to Defendants  
15 AWD Ranch "Ranch" and Desert Plants Conservancy "DPC." Farms has, at times,  
16 provided financial backing for Ranch and DPC and operated in cooperation with the  
17 two on a number of common interest projects. One such project for which Farms  
18 provided financial backing was the restoration of two of the existing ponds on the  
19 DPC land "The Project" by removing silt from the ponds to restore them to their  
20 original condition so that they could continue to hold sufficient water for the ongoing  
21 support of area wildlife. These ponds have been labeled AWD pond #'s 3, 5, & 6 for  
22 ease of reference (AWD ponds 5 & 6 were actually one contiguous pond). (PSOF ¶  
23 1.) Farms maintains that it did not actively participate in the planning or carrying out  
24 of the pond restoration project. (PSOF ¶ 2.) However, this Court need not make any  
25 determination of Farms' involvement in order to find that they could not be liable to  
26 Parsons for wrongful diversion and unlawful appropriation of water because, as set  
27 forth in greater detail below, Parsons did not have superior rights to the water in  
28 question.

1           **I. Wrongful Diversion and Unlawful Appropriation of Water**

2           Arizona follows a prior appropriation system of water rights, according to  
3           which a prior appropriator has superior rights to water over a subsequent  
4           appropriator because the former's appropriation pre-existed that of the latter. *See*  
5           *Generally In re Determination of Relative Rights, to Use of Waters of Pantano Creek*  
6           *In Pima County, Tattersfield v. Putman*, 45 Ariz. 156, 41 P.2d 228 (1935) *and* *Espil*  
7           *Sheep Co. v. Black Bill & Doney Parks Water Users Assn*, 16 Ariz.App. 201, 492 P.2d  
8           450 Ariz. App. (1972).

9           Parsons complains that Defendant Farms has somehow participated in an  
10          endeavor which has allegedly resulted in the wrongful diversion and unlawful  
11          appropriation of water that Parsons supposedly had some superior right to. However,  
12          given the prior appropriation system of water rights set forth above, such a claim  
13          necessarily presupposes that Parsons' appropriation of water predates the  
14          appropriation of water in the ponds located on the land that Walker sold to Ranch  
15          and DPC.

16          DPC performed restorative work by removing silt from what have been labeled  
17          as AWD Ponds 3, 5 & 6 (again 5 & 6 are actually one contiguous pond). (PSOF ¶ 3.)  
18          The pond labeled AWD Pond 3 was built at some point between the years 1980 and  
19          1992. Although it is not clear precisely when AWD Pond 3 was built, we can  
20          determine to an absolute certainty that it did not exist in or prior to 1980 and we can  
21          determine to an absolute certainty that it did exist as of 1992. (PSOF ¶ 4.) The pond  
22          labeled AWD Ponds 5 & 6 was built at some point between the years 1947 and 1972.  
23          Although it is not clear precisely when AWD Pond 5 & 6 was built, we can determine  
24          to an absolute certainty that it did not exist in or prior to 1947 and we can determine  
25          to an absolute certainty that it did exist as of 1972. (PSOF ¶ 5.) Parsons' pond was  
26          built at some point between the years 1992 and 1996. Although it is not clear  
27          precisely when Parson's pond was built, we can determine to an absolute certainty  
28

1 that it did not exist in or prior to 1992 and we can determine to an absolute certainty  
2 that it did exist as newly built or still under construction as of 1996. (PSOF ¶ 6.)

3 It is therefore an indisputable fact that AWD Pond 3, AWD Pond 4 and AWD  
4 Pond 5 & 6, and AWD Pond 7 were all in existence prior to Parson's pond.  
5 Accordingly, and pursuant to Arizona's prior appropriation system of water rights,  
6 Parsons is a junior user and cannot support its claim against Farms for wrongful  
7 diversion and unlawful appropriation of water. (PSOF ¶ 7.) Ironically, while  
8 attempting to defend allegations that Farms, Ranch, and DPC were diverting water  
9 belonging to Parsons, the true facts now reveal that Parsons is actually wrongfully  
10 diverting water from DPC. (PSOF ¶ 8.)

## 11 II. Conclusion

12 The undisputed facts set forth above entitle Defendant Farms to summary  
13 judgment on Parsons' Wrongful Diversion and Unlawful Appropriation of Water  
14 claim. Additionally, frequent case law references to water rights being appurtenant to  
15 the land (See In re Determination of Relative Rights to Use of Waters of Pantano  
16 Creek in Pima County Tattersfield v. Putnan, 45 Ariz. 156, 169, 41 P.2d 228, \*) and  
17 the interplay between easements for livestock access to stock ponds and the priority  
18 given to prior appropriators under Arizona's prior appropriation system of water  
19 rights also make one question whether the land and water questions in this matter are  
20 too intertwined to be efficiently bifurcated and tried separately.

21 For the foregoing reasons Defendant Farms respectfully requests that this  
22 Court enter an order granting Farms summary judgment on Parsons' Wrongful  
23 Diversion and Unlawful Appropriation of Water claim and give careful consideration  
24 to whether bifurcation of the water claims in this matter (should summary judgment  
25 not be granted) would be possible given the relationship between the water and land  
26 issues involved. Furthermore, Farms, as a creditor to DPC and Ranch, believes that  
27 bifurcation would lead to additional financial waste that would further jeopardize any  
28 chance Farms has of ever being repaid by DPC and Ranch.

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1 RESPECTFULLY SUBMITTED this 15 day of June, 2009.

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8 Original of the foregoing filed  
9 this 15 day of June, 2009:

10 Clerk of the Court  
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15 Copy of the foregoing e-mailed and/or mailed  
16 this 15 day of June, 2009, to:

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